IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2919 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SK VARSAT - Petitioner(s)

Versus

STATE OF GUJARAT & 2 - Respondent(s)

==========**Appearance :**

MS HARSHAL PANDYA for Petitioner(s) : 1,
MS KIRAN PANDE, ASST. GOVERNMENT PLEADER for Respondent(s) : 1 - 2.
MR LR PUJARI for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 31/1/2007

ORAL JUDGMENT

By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction and/or order quashing and setting aside the decision of the Government conveyed to the petitioner as an enclosure to the communication dated 4-4-1997 (Annexure F). It is also further prayed to direct the respondents to consider the name of the petitioner against the vacant advertised post of Under Secretary and to appoint the petitioner as Under Secretary if found

suitable. It is also further prayed to direct the respondents to give 4-4-1995 or any other subsequent date as the deemed date of appointment as Under Secretary with all consequential benefits.

2. It is the case on behalf of the petitioner that pursuant to the advertisement issued by the GPSC on 31-3-1993 for direct selection for the post of Under Secretary in the Gujarat Secretariat Service (Class I) for 10 post, which all were reserved for scheduled tribe, as the petitioner was eligible, he applied for the said post. It is the case on behalf of the petitioner that the said advertisement was issued as a special drive to clear the backlog of reserved vacancies for scheduled tribe in the cadre. That after due process of selection, the result was published by the GPSC on 16-2-1994, wherein the name of the petitioner was shown at serial No.2 in the waiting list. That the petitioner was informed by the GPSC by letter dated 19-2-1994 about his result. That on the basis of the result published by the GPSC, the Government issued appointment orders on 4-4-1995 for all the 10 candidates, who were in the select list. That out of the said 10 candidates, one Shri R.K. Malavia at serial No.10 did not join the service and conveyed his unwillingness to join the service vide letter dated 25-5-1995. As the candidate at serial No.1 in the waiting list was also not interested to join the service, he also conveyed his unwillingness to the Government by letter dated 31-1-1996. It is the case on behalf of the petitioner that thereafter, the petitioner represented to the Government from time to time for the appointment in the cadre of Under Secretary and one of the representations is dated 19-7-1996. That by communication dated 4-4-1997 from the office of the Minister of Tribal

Development (pursuant to the representation made by the petitioner to the concerned Minister) along with the copy of the undated note written by the Addl. Chief Secretary (Personnel), GAD, the petitioner was conveyed that he cannot be considered for appointment since the waiting list in which the name of the petitioner was included has lapsed. That being aggrieved by and dissatisfied with the said communication and the action of the respondents in not considering the case of the petitioner in the cadre of Under Secretary and not appointing the petitioner by implementing the waiting list, the petitioner has preferred the present Special Civil Application for the aforesaid reliefs.

3. Ms Harshal Pandya, learned advocate appearing on behalf of the petitioner has submitted that while rejecting the representation of the petitioner and not appointing the petitioner in the cadre of Under Secretary, the respondents have relied upon the circular dated 4-4-1979. However, the said instruction/circular would not be applicable as the same is an amendment in the original instruction dated 20-4-1970 and the main circular dated 20-4-1970 was issued to deal with the situation wherein government wants more name against the posts which have increased after the requisition was sent to the GPSC. It is submitted that in the present case, the petitioner is not claiming any post which was not advertised and therefore, the said instruction dated 20-4-1970 and the amendment therein dated 4-4-1979 cannot be applied in the present case. It is submitted that the advertisement was for 10 posts and the select list was prepared of 10 candidates and a waiting list was prepared and when a candidate in the select list did not join the duty and even the candidate

above the petitioner in the waiting list also shown his unwillingness to join the duty, it was the duty of the respondents to further implement and operate the waiting list and the next available candidate was the petitioner and therefore, the respondents ought to have appointed the petitioner if found suitable. It is also further submitted that the purpose for preparing the waiting list is that, if for some reason, a candidate in the select list does not join the duty, the waiting list is to be operated and the candidate in the waiting list is to be appointed on the post, which was offered to a candidate in the select list.

4. The learned advocate appearing on behalf of the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of **Gujarat State Deputy Executive Engineers' Association V. State of Gujarat and others** reported in JT 1994(3) SC 559. She has also relied upon the decision of the learned Single Judge of this Court in the case of **Rathodbhai J. Dungarbhai and others V. State of Gujarat and others** reported in 1995(1) GLH 180, more particularly para 46. She has also relied upon the decision of the Hon'ble Supreme Court in the case of **State of Bihar and another V. Madan Mohan Singh and others** reported in AIR 1994 SC 705 and the decision of this Court in the case of **Vinodkumar Rajabhai Rathod V. State of Gujarat** reported in 2005(1) GLH **321.** While relying upon the decision of the Hon'ble Supreme Court in the case of **K.P. Sudhakaran and others Vs. State of Kerala and others** reported in (2006) 5 SCC 386, she has submitted that the delay incurred in proceedings should not defeat the right of the petitioner. It is

also further submitted by her that even the State Government after realizing the above position, sent twice the recommendation to the GPSC to allow them to operate the waiting list and to appoint the petitioner, however, the GPSC refused the same and therefore, it is submitted that when the State Government itself has recommended to the GPSC, it is requested to allow the present Special Civil Application and to grant the relief as prayed for with all consequential benefits, such as seniority etc.

5. Petition is opposed by the respondents, State Government as well as the GPSC. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Shankarsan Dash V. Union of India** reported in 1991(3) SCC 47, it is submitted that mere inclusion of the name of the petitioner in the select list/ waiting list, it does not give any right in favour of the candidate in the select list/waiting list to claim the appointment and no direction can be issued to operate the select list/waiting list. It is also further submitted that the validity of the select list/waiting list is for two years and the representation submitted by the petitioner was after a period of two years and therefore, the representation of the petitioner has rightly been rejected and the petitioner has rightly not been appointed by operating the waiting list, the validity of which has expired after a period of two years. It is submitted that action of the respondents is in consonance with the Government resolutions. It is also further submitted on behalf of the State Government that the State Government was of the opinion that there was sufficient representations of scheduled tribe candidate in the cadre and therefore, backlog vacancy was not available

and therefore, it is requested to dismiss the present Special Civil Application.

6. It is also further submitted that if ultimately this Court is of the opinion that the petitioner was and is to be appointed in the cadre of Under Secretary, in that case, at the most a direction can be issued to consider the case of the petitioner and relying upon para 12 of the judgment in the case of Gujarat State Deputy Executive Engineers' Association (supra), it is submitted that seniority of the petitioner can be considered from the date of appointment and the petitioner cannot claim the appointment from the back date.

7. Heard the learned advocates appearing on behalf of the respective parties.

8. It is not in dispute that the advertisement was issued by the GPSC inviting the applications for 10 posts in the cadre of Under Secretary. It is also not in dispute that all the 10 posts were reserved for scheduled tribe candidate. It appears that the said advertisement was issued as a special drive to clear the backlog of the reserved vacancies for scheduled tribe in the cadre. It is also not in dispute that the petitioner applied for the said post pursuant to the said advertisement. A select list and waiting list were prepared by the GPSC; 10 candidates were in the select list and in the waiting list, the petitioner was at serial No.2. All the 10 candidates in the select list were issued appointment orders on 4-4-1995. It is required to

be noted that the GPSC declared the result on 16-2-1994 and the appointment orders came to be issued by the GPSC to all the 10 candidates vide letter dated 4-4-1995. On 25-5-1995, a candidate at serial No.10 conveyed his unwillingness to join the service. Under the circumstances, the said post was to be offered to a candidate who was at serial No.1 in the waiting list and accordingly a candidate who was at serial No.1 in the waiting list was offered the said post. However, the candidate who was at serial No.1 in the waiting list was also not interested to join and therefore, he also conveyed his unwillingness to the Government vide letter dated 31-1-1996. At this stage, it is required to be noted that the aforesaid unwillingness given by the candidate who was at serial No.1 in the waiting list was within two years of declaring the result and preparation of select list/waiting list. Thus, on conveying the unwillingness by the candidate, who was at serial No.1 in the waiting list on 31-1-1996, the post/appointment which was offered to a candidate at serial No.10 in the select list and thereafter offered to a candidate at serial No.1 in the waiting list, was also required to be offered to the petitioner being at serial No.2 in the waiting list. However, the petitioner was not offered the said post which was already advertised and which was offered to the aforesaid two candidates.

9. Now in backdrop of the above facts, the decision of the Hon'ble Supreme Court in the case of Gujarat State Deputy Executive Engineers' Association is required to be considered. In the aforesaid decision, the Hon'ble Supreme Court has held that “a waiting list prepared in service matters by the competent authority is a list of eligible and qualified

candidates who in order of merit are placed below the last selected candidate. It is also further observed that usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list, then it is in respect of those ten seats only for which selection or competition was held. It is also further observed that a candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. It is also further observed that a waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join them then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. Similar view has been taken by this Court in the case of Rathodbhai J. Dungarbhai and others (supra) and in an identical situation, when a candidate in the select list did not join the duty and when a candidate in the waiting list requested to appoint him by operating the waiting list and to appoint him on the post which was already advertised and offered to a candidate in the select list, this Court directed to exhaust the waiting list to that extent and to appoint a candidate in the waiting list on the post which was already advertised and offered. In the present case, in spite of the aforesaid facts, the State Government on the basis of the advice of the GPSC rejected the representation of the petitioner for appointment in the cadre of the Under Secretary on the ground that two

years have passed and the waiting list has lapsed/expired. It appears that circulars/resolutions relied upon by the State Government are not applicable to the facts of the present case. Here is a case in which 10 posts were advertised, 10 posts were offered to the candidates in the select list and one post was not filled in though advertised, as the last candidate in the select list and the candidate No.1 in the waiting list did not join the duties. It is also required to be noted and as stated in the affidavit-in-reply itself that pursuant to the representation, the Government did request the GPSC and send the requisition to the GPSC vide its letter dated 30-4-1996 to send the name of the person at serial No.2 in the waiting list, so as to enable the Government to appoint him to the post of Under Secretary as the candidate at serial No.1 in the waiting list informed the State Government his unwillingness for being appointed to the said post. However, the GPSC informed the State Government that as the waiting list has lapsed on 19-2-1996, the proposal of the State Government cannot be accepted. It is required to be noted at this stage that according to the GPSC and the State Government, the waiting list has expired on 16-2-1996. However, the candidate at serial No.1 in the waiting list has conveyed his unwillingness to the State Government vide letter dated 31-1-1996 i.e. before expiration of two years and before actual lapse of the waiting list. Had the respondents immediately undertaken the exercise of filling up the post, the petitioner would have been appointed, but the State Government however, did not undertake the exercise and so cannot now be permitted to say that they will not appoint the petitioner on the ground that the waiting list has lapsed. The learned advocate appearing on behalf of the petitioner is right in making

submission relying upon the decision of the Hon'ble Supreme Court in the case of K.P. Sudhakaran and another (supra) that delay cannot defeat the right of a person.

10. Now, so far as the decision relied upon by the learned advocate appearing on behalf of the respondents in the case of Shankarsan Dash (supra) is concerned, the same will not be applicable in the facts of the present case. In the case before the Hon'ble Supreme Court, a candidate who was in the waiting list requested to appoint him on the post, which arose due to selected candidate not joining the service. However, his request was after the closure of the select list. Even in the case before the Hon'ble Supreme Court, prior to closure of the select list, the posts which arose on account of candidates not joining IPS due to various reasons, were filled in by operating further merit list/select list/waiting list.

11. Now considering the aforesaid facts and the decision of the Hon'ble Supreme Court in the case of Gujarat State Deputy Executive Engineers' Association (supra) and the decision of this Court in the case of Rathodbhai J. Dungarbhai and others (supra), the respondents were required to fill up the 10th post which was initially offered to a candidate who was at serial No.10 in the select list and thereafter which was offered to a candidate at serial No.1 in the waiting list, by offering the said post to the petitioner who was at serial No.2 in the waiting list. Under the circumstances, the petitioner is entitled to a relief that he was required to be offered the 10th post by operating the waiting list and to appoint the

petitioner if found suitable.

12. Now the question which is required to be considered is what relief the petitioner is entitled to so far as the claim of the petitioner for deemed date of appointment and other consequential benefits are concerned. For the said aspect, the learned AGP has relied upon para 12 of the judgment in the case of Gujarat State Deputy Executive Engineers' Association (supra). It is the contention on behalf of the State Government that as observed by the Hon'ble Supreme Court, a candidate from the waiting list appointed, cannot claim appointment from a back date and the appointment of the candidate operates from a date he is appointed and not from the date those from the select list are appointed. On bare reading of the aforesaid decision and the para 12, the contention on behalf of the State Government seems to be very impressive but one cannot lost sight of the fact that the petitioner was required to be offered the appointment/ post when the candidate at serial No.1 in the waiting list shown his unwillingness and on that day, the State Government was required to further operate the waiting list and was required to offer the post to the petitioner being at serial No.2 in the waiting list. At the same time, on the principal of no work no pay, the petitioner is not required to be granted other consequential benefits as prayed for. At the same time, the prayer of the petitioner to give 4-4-1995 as the deemed date of appointment also cannot be granted, as the same is likely to affect so many other persons who are appointed subsequently, their seniority may be affected.

13. For the reasons as stated above, the petition succeeds in part. The respondents are directed to offer the 10th post in the cadre of Under Secretary which was offered to a candidate at serial No.10 in the select list and which was subsequently offered to a candidate at serial No.1 in the waiting list and to appoint the petitioner if found suitable by operating the waiting list which was prepared and published on 17-2-1994 and after offering the said post to the petitioner, the said waiting list is to be treated as inoperative. The aforesaid exercise to be completed within a period of six weeks from today. The seniority of the petitioner shall be considered from the date of appointment as the same is likely to affect so many other employees in the cadre of Under Secretary who are appointed subsequently and who are not before this Court and any order granting of seniority from back date is likely to affect all those employees in the cadre of Under Secretary who are appointed subsequently and who might have got further promotion also. The petitioner is also denied the wages for the interregnum period on the principal of no work no pay. Rule is made absolute to the aforesaid extent. No costs.

(M.R.SHAH,J.)

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